No. 48705-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID RAMIREZ,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Washington Statutes

Other Rules or Authorities

I. ISSUES

A. Did Ramirez receive effective assistance from his trial counsel?

B. Did the State present sufficient evidence to sustain the special verdict which found that Ramirez demonstrated an egregious lack of remorse?

C. Did the trial court consider Ramirez's present or future ability to pay prior to imposing non-mandatory legal financial obligations?

II. STATEMENT OF THE CASE

On September 18, 2015, David Ramirez went to the Providence Hospital Emergency Room in Centralia, Washington. RP[1] 126-27. Ramirez told the registration receptionist he was seeing things and had done too many drugs. RP 127. The receptionist observed that Ramirez was able to answer questions and follow the conversation. RP 127-28. The receptionist thought Ramirez's demeanor was nice and she joked with him about how Ramirez had done too many drugs and that before this, he had not done drugs in a long time. RP 127.

After Ramirez was checked in, Wendy Wilkinson, a triage nurse, took him into one of the hospital rooms. RP 134-35. While

[1] The State will cite to the transcript of the jury trial, which is in consecutive paginated volumes as RP.

Wilkinson was introducing herself, she turned toward Ramirez to hand him a hospital gown. RP 135. When Wilkinson turned toward him, Ramirez reached out and grabbed her breast. RP 135, 143. After a few seconds, Ramirez let go and backed away into the room. RP 136. Wilkinson left the room immediately and requested security be called. RP 136. Ramirez was moved to another room and watched by security guards. RP 137, 162.

While Ramirez was being seen by an ER technician, he commented about believing the nurses wanted to have sex with him based on how they were dressed. RP 147. The technician also observed Ramirez masturbating while in the hospital bed and that he did so over the course of at least an hour. RP 149. At times, the technician observed Ramirez to be sweating and mumbling and believed he was under the influence of drugs. RP 152. However, the technician also observed Ramirez to be oriented to time and space and able to carry on a conversation. RP 157.

Hospital security also observed Ramirez make sexual comments whenever a female walked by the room. RP 163. Ramirez stated, “Look at her butt. They are glad I groped her. They should be thankful. They should be thanking me.” RP 163. During this time,

security also observed Ramirez making movements under his hospital blanket that were consistent with masturbation. RP 163.

While Ramirez was meeting with the ER physician, he stated he was in the emergency room because he wanted to have sex with a female nurse and was “tired of beating off.” RP 218. Ramirez told the physician that he did not need any treatment for hallucinations. RP 218. Ramirez told the physician he had taken methamphetamine, but did not want any treatment for it. RP 218.

Police officers arrived to arrest Ramirez for assault and transport him to jail. RP 169. Officer Murphy spoke with Ramirez. RP 287-88. When asked what was going on, Ramirez replied “Nothing, dog.” RP 287. When asked why he grabbed the nurse’s breast, Ramirez replied, “If that's what she want to say." RP 287. When asked why he had been masturbating, Ramirez replied, "Whatever, dog. Was I masturbating?" RP 288.

While preparing to transport Ramirez, the officers found a glass pipe in Ramirez’s clothing along with a packet of gum containing methamphetamine. RP 171, 249. The officers also found a bindle of methamphetamine with Ramirez’s wallet in the pocket of his shorts. RP 192, 246. When Officer Murphy found the methamphetamine, Murphy stated “Oh, this isn't good." RP 288. In

response, Ramirez said it had been given to him and he was going to have it tested to find out what it was. RP 288.

Ramirez was charged with Assault in the Third Degree with Sexual Motivation and Possession of Methamphetamine. CP 1-3. At trial, Ramirez testified that he had gone to a bar after an argument with his wife. RP 256. Ramirez drank beer at the bar and left at closing time with some people that he had just met. RP 257. Ramirez went with the people to their house for some after-hours socialization. RP 257. Ramirez testified he had been given something to drink and shortly after started experiencing hallucinations. RP 258-60. Ramirez's new friends then dropped him off at the hospital. RP 260. Ramirez testified that he remembered the circumstances surrounding checking himself in with the receptionist but did not remember Wilkinson or having any physical contact with her. RP 261-265. Ramirez testified that when he was at the hospital, he was frightened and not behaving in a joking manner. RP 274-76.

Ramirez testified he had not willingly taken drugs that day and did not know where the pipe and methamphetamine came from. RP 273. Ramirez testified that he believed that drugs were given to him when he drank a beer at the house he went to after the bar. RP 273-74. Ramirez testified that the sensations he experienced were not

similar to the effects he felt with past methamphetamine use. RP 285-86.

Ramirez's defense counsel requested a jury instruction on voluntary intoxication, which was presented to the jury. RP 292-94; CP 55. Ramirez's defense counsel did not request a jury instruction on involuntary intoxication. RP 289-95. In closing argument, Ramirez's defense counsel argued Ramirez's appearance and behavior during the incident were evidence that he had been intoxicated. RP 321, 328. Ramirez's defense counsel did make references to Ramirez's testimony that he did not know where the drugs came from or what caused the hallucinations, which were atypical of his past methamphetamine use. RP 323, 329-30. However, the focus of the closing argument regarding intoxication was that Ramirez was unable to form intent because he was under the influence. RP 322, 329, 332-33.

The jury found Ramirez guilty of both charges and also found Ramirez had a sexual motivation in committing the assault and displayed an egregious lack of remorse. CP 63-66.

With an offender score of 14[2] and a sexual motivation enhancement, Ramirez's standard sentence range on Assault in the Third Degree was 60 to 60 months. CP 71-75. With an offender score of 12, Ramirez's standard range on Possession of Methamphetamine was 12 months and a day to 24 months. CP 71-75. While sentencing Ramirez within the standard range on each count, the trial court imposed an exceptional sentence by running the two counts consecutively to each other. RP 371-73; CP 80-81. The trial court stated that it was imposing an exceptional sentence because a concurrent sentence would be too lenient in light of Ramirez's unscored misdemeanor criminal history and because a concurrent sentence would have resulted in the Possession of Methamphetamine charge going unpunished in light of Ramirez's high offender score and sentence on the Assault in the Third Degree. RP 372-73, 377; CP 90. The trial court found it would have imposed the same sentence on either of these grounds. RP 386; CP 90.

Ramirez addressed the trial court at sentencing. RP 356-68. Ramirez informed the trial court he had been working at Weyerhaeuser prior to his arrest and was getting his life on track. RP

[2] Ramirez has not appealed the trial court's finding that his prior convictions did not "wash out" for sentencing purposes. RP 370-71.

359-60. Ramirez had opened his first savings account, was learning how to use a cell phone, and was paying all of the family bills. RP 359-60. The trial court found that Ramirez had the ability to earn money and make small payments on his legal financial obligations, imposing a $200 filing fee, $500 crime victim fee, $100 DNA fee, and $2,100 in attorney fees. RP 375-76; CP 83. This appeal follows. CP 91.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. RAMIREZ RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL ATTORNEY THROUGHOUT HIS CASE.

Ramirez's attorney provided competent and effective legal counsel throughout the course of his representation. Ramirez asserts his trial counsel was ineffective for requesting a voluntary intoxication instruction and failing to argue and request a jury instruction on involuntary intoxication. Brief of Appellant 7-19. Ramirez's attorney was not ineffective in any of the areas of his representation of Ramirez. If Ramirez's attorney was deficient in any way, Ramirez cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Ramirez's Attorney Was Not Ineffective During His Representation Of Ramirez Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Ramirez must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there

is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

a. It was not improper for Ramirez's attorney to request an instruction on voluntary intoxication and argue voluntary intoxication as a defense.

Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin,* 100 Wn.2d 417, 420, 670 P.2d 265 (1983). A proposed instruction should be given by the trial court if it is not misleading, properly states the law and allows the party to argue her or his theory of the case. *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), *citing State*

v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). "When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party." *Webb*, 162 Wn. App. at 208, *citing State v. Hanson,* 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990).

A defendant is entitled to a voluntary intoxication instruction if the crime charged has a particular mental state as one of its elements, there is evidence Ramirez had been drinking or consuming drugs, and there is evidence that the intoxication affected his ability to acquire the required mental state. *State v. O'Connell*, 137 Wn. App. 81, 94, 152 P.3d 349 (2007) (citation omitted).

Although Ramirez only presented evidence of voluntary consumption of alcohol, the evidence presented by the State also suggested voluntary consumption of other intoxicants, specifically methamphetamine. Ramirez testified he had consumed alcohol. RP 256-60. The hospital receptionist testified that Ramirez joked about having done too many drugs. RP 127. The ER Physician testified that Ramirez told him he had used methamphetamine. RP 218. Officers found methamphetamine with his belongings, including in the pocket of his shorts. RP 171, 192. Multiple witnesses testified to Ramirez

appearing to be under the influence. RP 152, 183, 219-20, 226. This evidence is sufficient to instruct the jury on the defense of voluntary intoxication. The instruction correctly stated the law and did not prevent Ramirez from arguing his theory of the case. In light of the evidence presented, it was proper for the trial court to give the voluntary intoxication instruction, and it was not deficient for Ramirez's attorney to request the instruction.

b. If Ramirez was entitled to an involuntary intoxication jury instruction, there is a strategic reason for his attorney to not request the instruction or emphasize the defense.

To prevail on an ineffective assistance claim regarding counsel's failure to request a jury instruction, the defendant must show that he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012).

In a trial setting, if an attorney's conduct can be characterized as legitimate tactics or trial strategy the attorney's performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If an attorney's actions are trial tactics or the theory of the case the reviewing court will not find ineffective assistance of counsel. *Grier*, 171 Wn.2d at 33. Because there is a strong presumption that an

attorney's performance in his or her representation of the client was reasonable, "[t]o rebut this presumption the defendant bears the burden of establishing the absence of any *conceivable* legitimate tactic explaining counsel's performance." *Id*. at 42. *Grier* goes on to state, "Although risky, an all or nothing approach was at least conceivably a legitimate trial strategy to secure an acquittal." *Id.*

Involuntary intoxication is a complete defense available when a defendant was made intoxicated by force or fraud and that intoxication rose to the level of insanity, such that the defendant did not know the nature and quality of his act or know that his act was wrong. *State v. Stacy*, 181 Wn. App. 553, 570-73, 326 P.3d 137 (2014) (citations omitted).[3] The defendant must prove involuntary intoxication by a preponderance of the evidence. *Id*. at 570.

The only evidence presented at trial suggesting involuntary intoxication was Ramirez's testimony that he had not voluntarily taken drugs, he believed drugs were given to him when he drank a beer at the house, and the sensations he experience were not similar to those of his past methamphetamine use. RP 273-74, 285-86.

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[3] *State v. Stacy* discusses both voluntary and involuntary intoxication defenses, citing the Washington State Supreme Court case *State v. Mriglot*, 88 Wn.2d 573, 564 P.2d 784 (1977), which refers to involuntary intoxication as a disfavored defense. *Stacy*, at 570. In *Mriglot*, the Court states: "Since involuntary intoxication acts to excuse the criminality of an act, it must rise to the level of insanity, which in this jurisdiction is determined by the M'Naghten test." *Mriglot*, at 575.

Ramirez testified to experiencing hallucinations that he found frightening. RP 258-60, 274-76. The trial court may not have found this evidence sufficient to show Ramirez had been rendered criminally insane through involuntary intoxication had he requested an involuntary intoxication instruction. Regardless, it was not deficient for Ramirez's counsel to not request such an instruction.

Even if the court would have found Ramirez was entitled to a jury instruction on involuntary intoxication, there was a conceivable, legitimate tactic for his attorney to not request the instruction and emphasize the defense. At trial, Ramirez's attorney did refer to Ramirez's testimony that he had never had these hallucinations before despite previously using methamphetamine, and that Ramirez said he did not know where the drugs came from or what was causing the hallucinations RP 323, 329-30. However, Ramirez's attorney did not aggressively argue that Ramirez had been surreptitiously slipped drugs. RP 321-33. The argument was focused on Ramirez being unable to form intent due to his intoxication, regardless of its voluntariness. RP 329-33.

It would be completely reasonable for Ramirez's attorney to decide that the evidence for voluntary intoxication was more credible than involuntary intoxication, especially in light of the fact that officers

found methamphetamine in Ramirez's belongings and Ramirez told multiple witnesses he had been using drugs. Emphasizing the involuntary intoxication defense in the alternative would make his primary argument look weaker, and focusing on a more credible voluntary intoxication defense would be more effective. "That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis." *Grier*, 171 Wn.2d at 43. Because it was a reasonable trial tactic, Ramirez has not made the required showing that his attorney's performance was deficient and his ineffective assistance claim fails. This Court should affirm Ramirez's conviction.

3. If Ramirez's Attorney Is Found To Be Deficient, Ramirez Has Not Met His Burden To Show That He Was Prejudiced By The Deficient Performance Of His Attorney.

The State maintains that Ramirez's attorney's performance was not deficient. Arguendo, if this Court were to find Ramirez's attorney's performance deficient, Ramirez has not met his burden to show he was prejudiced.

Ramirez must show that, but for his attorney's error for failing to request an involuntary intoxication jury instruction, the jury would have found Ramirez not guilty. *See Horton*, 116 Wn. App. at 921-22.

Ramirez cites *In re Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007) and *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009) to argue that his attorney's failure to propose the instruction and argue the defense prejudiced him. Brief of Appellant 16-19.

In *Hubert*, the defendant's attorney failed to propose a jury instruction on the reasonable belief affirmative defense to the charge of second degree rape. 138 Wn. App. at 929. The defense attorney attested that his failure to propose the instruction was due to his not being familiar with the defense. *Id*. The Court found the attorney's performance deficient, as there was no conceivable strategy in failing to investigate the relevant statutes under which his client was charged to learn of and argue the defense. *Id*. at 929-30.

In *Powell*, the defendant's attorney also failed to propose a jury instruction on the reasonable belief affirmative defense to the charge of second degree rape. 150 Wn. App. at 155. The Court found that without the reasonable belief instruction, it would have appeared to the jury that it had no option but to convict the defendant if it found beyond a reasonable doubt that he had sexual contact with an incapacitated victim, regardless of whether it also found the defendant reasonably believed she had consented. *Id*. 156-57. The

Court found the absence of the instruction essentially nullified Powell's defense. *Id*. at 157.

One of the primary reasons to distinguish this case from *Hubert* and *Powell* is because Rape in the Second Degree does not require proof of the existence of any mental state. *State v. Walden*, 67 Wn. App. 891, 895, 841 P.2d 81 (1992). It is only once the "reasonable belief" defense is raised, that the defendant's mental state, what he believed at the time, becomes an issue. RCW 9A.44.030(1). However, Assault in the Third Degree does require evidence of mental state within the State's burden of proof. The State has to prove the defendant intentionally assaulted the victim. *State v. Mathews*, 60 Wn. App. 761, 766-67, 807 P.2d 890 (1991).

Here, the jury was told in the to convict instruction that in order to find Ramirez guilty of Assault in the Third Degree, they needed to find beyond a reasonable doubt that he assaulted Wilkinson. CP 145. The jury was informed that assault is defined as "an intentional touching of another person." CP 48. Juries are presumed to follow the court's instructions. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). Defense counsel focused the argument on a lack of intent due to intoxication and he also referenced Ramirez's testimony that he had not intentionally consumed drugs. RP 322, 329-30, 332-

33. Had the jury believed that Ramirez had been so intoxicated that he was legally insane and could not know the nature and quality of his act or know that his act was wrong, jury would not have found his assault of Wilkinson to be intentional, and the jury would have found Ramirez not guilty.

However, the jury did find Ramirez guilty of Assault in the Third Degree. CP 63. This means that the jury found each element of the crime was proven beyond a reasonable doubt. It also means the jury did not find Ramirez was unable to form intent due to his intoxication. CP 14. This implies that even if the trial court gave an instruction on involuntary intoxication, the jury still would have found Ramirez guilty. Ramirez's ineffective assistance of counsel argument fails as he was not prejudiced by his attorney's performance and this Court should affirm the conviction.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING THAT RAMIREZ DISPLAYED AN EGREGIOUS LACK OF REMORSE.

Ramirez argues the State did not present sufficient evidence to sustain the jury's finding by special verdict that he displayed an egregious lack of remorse in committing Assault in the Third Degree. Brief of Appellant 22-23. The State presented sufficient evidence to sustain the jury's finding. The trial court imposed Ramirez's sentence

on other, unchallenged grounds, therefore Ramirez's sentence stands regardless.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. There Was Sufficient Evidence Presented To The Jury To Sustain The Special Verdict That Ramirez Displayed An Egregious Lack Of Remorse.

A challenge to a jury's finding of an aggravating factor is reviewed under the sufficiency of the evidence standard. *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144 (2011) *review denied,* 173 Wn.2d 1018 (2012). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id*. An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v.*

Goodman, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d at 638.

An aggravating factor cannot be a factor inherent in the crime, as part of the elements necessary to prove the offense. *State v. Jennings*, 106 Wn. App. 532, 555, 24 P.3d 430 (2001) (citation omitted). An aggravating factor is something that distinguishes the behavior of the defendant from the behavior inherent in the commission of that crime. *Id.*

A criminal defendant's lack of remorse can be an aggravating factor if the lack of remorse is of an egregious nature. *State v. Ross*, 71 Wn. App. 556, 563, 861 P.2d 473 (1993) (citations omitted). A defendant's conduct by exercising his or her right to remain silent or refuses to admit guilt cannot be considered as a lack of remorse. *State v. Russell*, 69 Wn. App. 237, 251, 848 P.2d 743 (1993) (citation omitted). "Whether a sufficient quantity or quality of remorse is present in any case depends on the facts." *State v. Ross*, 71 Wn. App. 555.

In *Russell* the defendant was convicted of homicide by abuse of his 20 month old son. *State v. Russell*, 69 Wn. App. at 241. Russell beat his son several times in the head with brass knuckles, hid his son's injuries from the mother by not allowing her in their son's room and later when the mother was able to check on the child, finding him pale, limp and moaning, Russell attempted to block the mother's efforts to obtain medical treatment for their son. *Id.* at 241-42. The testimony elicited at trial showed that Russell hid his son, who was suffering from the injuries Russell had inflicted on the child, interfered with medical personnel, insisted on cleaning the apartment where his son died prior to a follow-up visit by the police, told relatives he had fooled the police and within a few days of his son's death, Russell

was ready and willing "to party." *Id.* at 752. Although Russell indicated remorse during the sentencing, the reviewing court found that the record supported the trial court's conclusion that any remorse shown lacked credibility and that Russell did exhibit an egregious lack of remorse. *Id.*

In *Ross* the defendant pleaded guilty to reduced charges, by an *Alford*[4] plea, to one count of second degree murder and two counts of robbery in the first degree. *State v. Ross*, 71 Wn. App. at 560. The trial court sentenced Ross to an exceptional sentence based upon a number of aggravating factors, including egregious lack of remorse. *Id.* at 560-61. The reviewing court held there was sufficient evidence to support the aggravating factor of egregious lack of remorse. *Id.* at 563-64. The court noted that while Ross testified he regretted killing the victim, the testimony of the community corrections officer and of Ross showed that Ross exhibited an extreme lack of remorse for the crimes he had committed. *Id.* at 563. The court noted Ross continued to place blame on the criminal justice system for his crimes, the trial court did not believe Ross was sorry and it was for the trial court to make any credibility determinations. *Id.* at 563-64.

[4] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970).

Ramirez's words and conduct, as testified to by multiple witnesses, show an extreme indifference to the harm resulting from his assault of Wilkinson. Witnesses testified that for an extended time period after Ramirez grabbed Wilkinson's breast, Ramirez was seen to be masturbating. RP 149, 163. Ramirez made comments about how the nurses dressed and suggested that they wanted to have sex with him. RP 147. Ramirez made sexual comments when women walked by his room and said that they should be thankful and glad he groped her. RP 163.

Ramirez's comments and his conduct of masturbating in front of people while in the hospital were belittling in nature with respect to the harm suffered by Wilkinson and reflected an ongoing indifference to such harm. The comments and conduct suggest Ramirez took pleasure and enjoyment from the assault of Wilkinson. While there is no evidence that Wilkinson was directly exposed to Ramirez's comments or masturbation, increasing the suffering of the victim is not the only consideration when determining whether a defendant displayed an egregious lack of remorse. *See* WPIC 300.26. The nature and quality of the comments and conduct demonstrating an egregious lack of remorse are necessarily going to

be different in an Assault in the Third Degree with sexual motivation than they would be in cases involving homicide or murder.

The jury heard from Ramirez in direct testimony and was able to observe his demeanor and cadence on the stand to inform its decision. The jury determines the credibility and weight to give Ramirez's statements. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). When viewing the evidence and making inferences in the light most favorable to the State, there was sufficient evidence presented to the jury to support and sustain the special verdict that Ramirez demonstrated or displayed an egregious lack of remorse.

3. The Trial Court's Imposition Of An Exceptional Sentence Was Based On Other Aggravating Factors.

If a trial court finds there are substantial and compelling reasons to impose an exceptional sentence it may order sentences to be served consecutively rather than concurrently. RCW 9.94A.535. The trial court must enter written findings of fact and conclusions of law setting forth its reason for imposing the exceptional sentence. RCW 9.94A.535. If a trial court relies upon reasons that are not substantial and compelling for the imposition of an exceptional sentence, it exceeds its authority and the matter is

required to be remanded for resentencing within the standard range. *State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). If the trial court indicates it would have given the same sentence for any of the aggravating factors, a finding that one of the factors is invalid would not require the court to remand for resentencing. *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

Ramirez does not challenge the trial court's findings for imposition of the exceptional sentence. Brief of Appellant 20. The trial court in the present case imposed consecutive sentences based on the free crimes doctrine and based on Ramirez's extensive unscored misdemeanor history. RP 377; RCW 9.94A.535(2)(b)-(c). The trial court held that either of the factors would justify the sentence. RP 386. The court did not consider the jury's finding of egregious lack of remorse when imposing the exceptional sentence. RP 377. If this Court finds there was insufficient evidence to sustain the jury's finding, the finding was not a basis for the exceptional sentence, remand for resentencing is not a proper remedy, and the sentence should be affirmed.

C. THERE WAS SUFFICIENT INFORMATION PROVIDED AT THE SENTENCING HEARING TO PROVIDE A BASIS FOR THE TRIAL COURT'S IMPOSITION OF THE LEGAL FINANCIAL OBLIGATIONS.

Ramirez argues the trial court imposed legal financial obligations without any meaningful consideration of his ability to pay. Brief of Appellant 23-27. However, the information shared by Ramirez at his sentencing hearing was sufficient for the trial court to conclude that Ramirez had a present or future ability to pay the imposed legal financial obligations at the rate of 25 dollars a month. See CP 83. Further, Ramirez did not object to the imposition of the legal financial obligations. RP 375-76, 381-84. This court should affirm the imposition of the legal financial obligations.

A defendant who at the time of sentencing fails to object to the imposition of non-mandatory legal financial obligations is not automatically entitled to review. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Unpreserved legal financial errors do not command review as a matter of right. *Blazina*, 182 Wn.2d at 833. The trial court is required to consider a defendant's current or future ability to pay the proposed legal financial obligations "based upon the particular facts of the defendant's case." *Id.* at 834.

There was no objection to the imposition of legal financial obligations at the sentencing hearing. RP 375-76, 381-84. A timely

objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court); *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814, 822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal).

Ramirez informed the trial court at sentencing of his living and employment situation prior to getting these charges. RP 356-68. Ramirez told the court that he had been clean for many years and was doing well, getting on track. RP 359-60. Ramirez had been employed at the Weyerhaeuser Nursery in Rochester, working minimum wage. RP 359, 363.[5] Ramirez told the court that his job was

[5] In Ramirez's statement to the court, he said that he was working and had found a church. RP 360. Appellate counsel appears to have taken the placement of these statements to mean that Ramirez had been working at a church. Brief of Appellant 26. However, Ramirez did specify that he was "working out at Weyerhaeuser in Rochester." RP 359-60. Weyerhaeuser is an international forest products company and has a seed orchard in Rochester, WA.

fine because it took care of everything and he was paying all of the family bills. RP 359, 363.

Based on this information, the trial court could conclude that Ramirez had the ability to earn money and make small payments on his financial obligations. The trial court's finding was supported by the record, and this Court should affirm the imposition of legal financial obligations.

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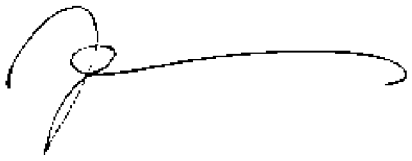
IV. CONCLUSION

Ramirez received effective assistance of counsel from his attorney throughout the trial. The State presented sufficient evidence to sustain the jury's special verdict of egregious lack of remorse, and regardless, this was not the basis for Ramirez's exceptional sentence. Finally, there was sufficient information provided at the sentencing hearing for the trial court to conclude Ramirez had the present and future ability to pay the imposed legal financial obligations. This Court should affirm Ramirez's conviction.

RESPECTFULLY submitted this 2nd day of February, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by:_____
JESSICA L. BLYE, WSBA 43759
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. DAVID RAMIREZ, Appellant.	No. 48705-5-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Jessica L. Blye, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 2, 2017, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Kathleen A. Shea, Washington Appellate Project, attorney for appellant, at the following email address: wapofficemail@washapp.org and kate@washapp.org.

DATED this 2nd day of February, 2017, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

February 02, 2017 - 10:26 AM

Transmittal Letter

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Court of Appeals Case Number: 48705-5

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Letter

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Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

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